

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
NatTel, LLC Petition to Deny Application	)	File No. 0003382234
of Puerto Rico Telephone Company, Inc.	)	
for 700 MHz Band Licenses, Auction No.	)	
73	)	

**ORDER**

**Adopted:** January 16, 2009

**Released:** January 16, 2009

By the Chief, Mobility Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. In this *Order*, we consider a petition to deny<sup>1</sup> filed on April 29, 2008, by NatTel, LLC (NatTel) against the application of Puerto Rico Telephone Company, Inc. (“PRTC”) for 700 MHz Band licenses for which it was the high bidder in Auction No. 73.<sup>2</sup> For the reasons stated below, we hereby deny the petition to deny filed by NatTel against PRTC’s Application.

**II. BACKGROUND**

2. PRTC is the winning bidder from Auction 73 of two licenses in the Lower 700 MHz Band—the A-Block license in the Puerto Rico and Virgin Islands BEA (BEA174) and the B-Block license in the San Juan-Caguas, Puerto Rico CMA (CMA091).<sup>3</sup> PRTC is a wireless and wireline service provider that is wholly-owned and controlled by América Móvil, S.A.B. de C.V. (“Móvil”) through several indirect subsidiaries.<sup>4</sup> Móvil is a publicly-traded corporation organized under the laws of Mexico.<sup>5</sup> Carlos Slim Helú and certain members of his family directly and indirectly hold approximately 31 percent of the equity interests and 64.5 percent of the voting interests in Móvil.<sup>6</sup> PRTC notes that the Commission has previously found that Móvil is ultimately controlled by Carlos Slim Helú.<sup>7</sup>

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<sup>1</sup> NatTel, LLC Petition to Deny Application of Puerto Rico Telephone Company, Inc. (filed Apr. 29, 2008) (“NatTel Petition”).

<sup>2</sup> Application, FCC Form 601, File No. 0003382234 (filed April 2, 2008) (“Application”).

<sup>3</sup> See Auction of 700 MHz Band Licenses Closes, Winning Bidders Announced for Auction 73, *Public Notice*, 23 FCC Rcd 4572 (2008).

<sup>4</sup> See Application; Puerto Rico Telephone Company, Ownership Disclosure Form 602, File No. 0003273343, Indirect Ownership Attachment at 1 (filed Jan. 2, 2008) (“January 2, 2008 Form 602”).

<sup>5</sup> January 2, 2008 Form 602, Indirect Ownership Attachment at 2.

<sup>6</sup> *Id.* PRTC filed a more current Form 602 on September 9, 2008. In this Form 602, PRTC reports that Carlos Slim Helú and certain members of his immediate family directly and indirectly now hold an approximate 30 percent equity interest and 66 percent voting interest in Móvil. Puerto Rico Telephone Company, Ownership Disclosure Form 602, File No. 0003573775, Attachment: Revised Description of Direct and Indirect Ownership at 2 (filed Sept. 9, 2008; exhibit dated July 16, 2008) (“September 9, 2008 Form 602”).

<sup>7</sup> See Application, Exhibit B, Request for Declaratory Ruling at 3.

3. On April 2, 2008, PRTC filed the required Application to obtain the licenses for which it was the high bidder in Auction 73, and the Application references the ownership information submitted in its Ownership Report, FCC Form 602, filed on January 2, 2008.<sup>8</sup> The Application appeared on public notice announcing that it was accepted for filing and that petitions to deny were due on May 2, 2008.<sup>9</sup> On April 29, 2008, NatTel filed a Petition to Deny against PRTC's application for the licenses won in Auction 73.<sup>10</sup> In its Petition, NatTel argues that Móvil and PRTC lack the basic character qualifications to be granted the Auction 73 licenses.<sup>11</sup> NatTel further argues that a grant of the licenses would be inconsistent with the public interest, convenience, and necessity,<sup>12</sup> and that the Commission should deny the licenses or designate the application for hearing.<sup>13</sup> Finally, NatTel argues that PRTC's failure to identify any real party in interest in the application is a misrepresentation and omission that additionally justifies disqualification of the applicant.<sup>14</sup>

4. PRTC filed an Opposition to NatTel's Petition on May 9, 2008, asking the Commission to dismiss or deny NatTel's Petition and to proceed to grant PRTC's application.<sup>15</sup> In response, NatTel filed a Reply to PRTC's Opposition on May 16, 2008, maintaining that the Commission should deny PRTC's application, designate the application for hearing, or condition the grant of the licenses upon the outcome of NatTel's pending litigation against Móvil.<sup>16</sup>

### III. DISCUSSION

5. NatTel asserts that it was founded in 1995 to participate in Personal Communications Service (PCS) Auction No. 5, and was focused on the Caribbean wireless telecommunications market.<sup>17</sup> Through several subsequent transactions, NatTel became the party in control of Oceanic Digital Communications, Inc. ("ODC"), the first digital wireless telecommunications operator in the Caribbean.<sup>18</sup> NatTel notes that in 2000, its control of ODC "shifted from NatTel to S.A.C. Capital," a hedge fund located in Stamford, Connecticut, which has slowly liquidated ODC and sold all of ODC's assets, including the sale of ODC's Jamaica operation ("MiPhone") to Móvil in November 2007.<sup>19</sup> According to

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<sup>8</sup> See Application, Exhibit A; January 2, 2008 Form 602.

<sup>9</sup> Wireless Telecommunications Bureau Announces that Applications for 700 MHz Band Licenses Are Accepted for Filing, *Public Notice*, 23 FCC Red 6722 (WTB 2008).

<sup>10</sup> NatTel asserts standing to challenge PRTC's application based on NatTel's own participation in Auction 73, and claims it thus has status as a "party in interest" within the meaning of Section 309(d)(1) of the Communications Act of 1934, as amended ("the Act"). NatTel Petition at 1, citing 47 U.S.C. § 309(d)(1).

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.* at 2, citing U.S.C. § 309(d)(1), 12-13.

<sup>13</sup> *Id.*

<sup>14</sup> NatTel Petition at 2, 12.

<sup>15</sup> Puerto Rico Telephone Company, Inc. Opposition to Petition to Deny of NatTel, LLC at 8-9 (filed May 9, 2008) ("PRTC Opposition").

<sup>16</sup> NatTel, LLC Reply to Opposition of Puerto Rico Telephone Company, Inc. at 5 (filed May 16, 2008) ("NatTel Reply").

<sup>17</sup> NatTel Petition at 3.

<sup>18</sup> *Id.* NatTel states that, in 1997, it founded Paradise Communications, Inc. ("Paradise") to pursue wireless opportunities in the Caribbean. Paradise merged with a Bahamian international business company with the same name in December 1998. The surviving entity changed its name to ODC. NatTel further states that, under its direction, "ODC became the first digital wireless telecom operator in the Caribbean in 1998."

<sup>19</sup> *Id.* at 3-4.

NatTel, it has been involved in litigation with both ODC and its controlling shareholder, S.A.C. Capital, and these pending lawsuits are its primary assets as NatTel proceeds with a Chapter 11 bankruptcy case in Connecticut.<sup>20</sup>

6. NatTel's alleges in its lawsuits against Móvil, S.A.C. Capital, and others that the sale of ODC's Jamaican operation MiPhone to Móvil was unlawful and fraudulent.<sup>21</sup> Specifically, NatTel argues that the transaction was intentionally structured to enable S.A.C. Capital "to misappropriate and divert to itself the entire \$75 million in MiPhone sale proceeds to the detriment of NatTel, with Móvil being rewarded by being able to acquire MiPhone for substantially less than its fair market value."<sup>22</sup> According to NatTel, a "sham entity" was created as the sole shareholder of MiPhone, Móvil paid \$9 million to MiPhone's sole direct shareholder, and the remaining \$66 million to S.A.C. Capital—with even the \$9 million eventually diverted back to S.A.C. Capital for payment of alleged "debt" that, according to NatTel, has not yet been fully explained.<sup>23</sup> In effect, claims NatTel, the entire \$75 million purchase of MiPhone was diverted to and misappropriated by S.A.C. Capital to the detriment of NatTel, and the supposed "debt" payment from the sole shareholder back to S.A.C. Capital was fraudulent.<sup>24</sup>

7. In addition to this diversion of funds and undervaluation of the MiPhone transaction, NatTel notes that there was a "no-shop" clause in the sale contract with Movil, whereby ODC and S.A.C. Capital were not permitted to seek out or entertain higher and better offers for MiPhone, and no "fiduciary out" exception was included that would allow the selling companies' controlling shareholders and directors to honor their fiduciary duties to minority shareholders to seek such offers.<sup>25</sup> NatTel argues that the "no-shop" clause was governed by New York law pursuant to the purchase agreement itself, and that the clause violated New York law because the ODC board of directors did not establish an independent committee to review the fairness of the transaction to ODC's minority shareholders such as NatTel.<sup>26</sup>

8. NatTel adds that prior to the consummation of the MiPhone transaction involving Móvil, NatTel identified an entity named Digicel as a potential funding source through which NatTel could make a counter-bid for MiPhone.<sup>27</sup> NatTel alleges that Digicel decided not to participate in the counter-bid due to potential complications caused by the "no-shop" clause together with a letter issued by Móvil threatening litigation if Digicel interfered with the Móvil-MiPhone transaction.<sup>28</sup> When Digicel backed away from discussion regarding the funding of the counter-bid, NatTel was unable to submit a counter-bid and the Móvil-MiPhone transaction was consummated.<sup>29</sup>

9. Further, NatTel argues that it suffered actual damages in the amount of \$75-100 million for all of these reasons, and was subjected to tortious interference with its business expectancy in the

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<sup>20</sup> *Id.* at 4.

<sup>21</sup> *Id.* (citing *NatTel, LLC v. SAC Capital Associates, LLC, et al.*, No. FST-CV-08-5007031-S (X08) (J.D. of Stamford)).

<sup>22</sup> NatTel Petition at 5.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 5-6.

<sup>25</sup> *Id.* at 6.

<sup>26</sup> *Id.* at 6-7. We note that NatTel does not, however, cite to any specific New York law that would invalidate the "no-shop" clause.

<sup>27</sup> *Id.* at 7.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

MiPhone sale including a loss of its fair share of the proceeds,<sup>30</sup> loss of the potential Digicel funding source due to the threat letter from Móvil,<sup>31</sup> the unlawful “no-shop” clause,<sup>32</sup> breach of fiduciary duty toward NatTel under Connecticut and New York common law,<sup>33</sup> and Móvil’s use of foreign citizenship to avoid United States laws and legal proceedings despite extensive operations in the United States including ownership of TracFone, the largest prepaid cellular provider in the United States.<sup>34</sup> NatTel accordingly argues that these character issues justify the denial of PRTC’s application, and that a grant of the licenses would be inconsistent with the public interest, convenience, and necessity.

10. Finally, NatTel adds that PRTC failed to answer Question 28 in its Form 601 Application, which asks for the name of any real party in interest, amounting to a misrepresentation or omission that additionally justifies disqualification of the applicant.<sup>35</sup> NatTel argues that even with a disclosure elsewhere that Móvil is an indirect 100 percent owner, there is still no certainty as to who is the ultimate real party in interest—specifically, who owns and controls Móvil, and how such control is exercised.<sup>36</sup>

11. In its Opposition, PRTC argues that NatTel’s Petition raises no material questions of fact regarding PRTC’s qualifications to be a Commission licensee, and merely raises a non-adjudicated, private dispute that is immaterial to the application for Auction 73 licenses.<sup>37</sup> PRTC asserts that the Commission consistently has refused to take such private disputes into consideration when acting on licensing applications, particularly where the appropriate remedy is money damages, and the right to such damages would not be affected by a grant of an application.<sup>38</sup> PRTC also argues that it has not engaged in any of the types of misconduct that are grounds for dismissal based on basic character qualifications: violation of Commission rules and regulations; already-adjudicated non-Commission misconduct including fraud; any felony; or egregious misconduct.<sup>39</sup> Finally, PRTC argues that contrary to NatTel’s accusation, Móvil’s 100 percent indirect ownership interest in PRTC is sufficiently and directly disclosed

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<sup>30</sup> *Id.* at 8.

<sup>31</sup> *Id.* at 8-9.

<sup>32</sup> *Id.* at 9.

<sup>33</sup> *Id.* at 9, 10. NatTel argues that under Connecticut law, specifically the Connecticut Unfair Trade Practices Act, Móvil is liable to NatTel for treble punitive damages in an amount up to \$300 million. *Id.* at 10.

<sup>34</sup> *Id.* at 10-12.

<sup>35</sup> *Id.* at 12.

<sup>36</sup> NatTel Reply at 2-3. We note that NatTel sent the Bureau a letter requesting a copy of a letter that the Bureau sent to PRTC regarding PRTC’s short-form application for Auction 78, alleging that the Bureau’s letter may shed light on PRTC’s ownership issues in Auction 73. *See* Letter from Jack E. Robinson, President, NatTel, LLC, Emergency Request for Information (filed July 8, 2008). As Mr. Robinson’s informal request is solely based upon speculation and is not made pursuant to any recognized administrative process such as a Freedom of Information Act request, we will not introduce the Bureau letter into the record. We do not make such letters public because they contain sensitive information, and Mr. Robinson’s request has not made the requisite case to get access to the letter. Thus, we deny Mr. Robinson’s request

<sup>37</sup> PRTC Opposition at 1.

<sup>38</sup> *Id.* at 2-4.

<sup>39</sup> *Id.* at 5-6. PRTC argues that even if there were non-Commission misconduct, it would have to be adjudicated as such before the Commission could consider it in an assessment of PRTC’s character, and NatTel itself admits that the alleged misconduct of America Móvil currently is being litigated. *Id.* at 6, 7.

in PRTC's Form 602 application, and indirectly disclosed in Exhibit A to PRTC's Form 601 application by reference to Form 602.<sup>40</sup>

12. Based on the record before us, we deny NatTel's Petition. The Commission has consistently held that it will consider certain forms of adjudicated, non-Commission related misconduct that includes: (1) felony convictions; (2) fraudulent misrepresentation to government units; and (3) violations of antitrust or other laws protecting competition.<sup>41</sup> The Commission refrains from making decisions based on mere allegations of misconduct where those allegations are in the process of being adjudicated by another agency or court.<sup>42</sup> However, the Commission has stated that it might consider non-Commission related misconduct prior to adjudication by another body in "circumstances in which an applicant has engaged in . . . misconduct so egregious as to shock the conscience and evoke almost universal disapprobation."<sup>43</sup> The Commission also has consistently held that private contractual disputes are beyond its regulatory jurisdiction and must be resolved in a local court of competent jurisdiction.<sup>44</sup> Further, with respect to Commission-related conduct, the Commission has held that it would treat any violation of any provision of the Communications Act or the Commission's rules as predictive of an applicant's future truthfulness and reliability and, thus, as having a bearing on the applicant's character qualifications.<sup>45</sup>

13. We agree that the ongoing dispute involving NatTel and Móvil, S.A.C. Capital, and others is outside the scope of our review of PRTC's Auction 73 application. Although, as discussed above, the private nature of their litigation does not totally exempt it from our assessment of PRTC's or Móvil's character qualifications *per se*, we find that there is nothing in the record to justify denial of PRTC's application on the basis of character qualifications. NatTel appears to concede that its allegations against Móvil relate to misconduct, prior to adjudication by a court, that is not related to the Commission, its regulations, and related laws.<sup>46</sup> We agree with PRTC, that with the exception of misconduct "so egregious as to shock the conscience and evoke almost universal disapprobation,"<sup>47</sup> the Commission does

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<sup>40</sup> *Id.* at 7-8.

<sup>41</sup> *See, e.g.,* AT&T Inc. and BellSouth Corporation Application for Transfer of Control, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5756 ¶ 191 (2007) ("*AT&T-BellSouth Order*"); Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, WT Docket No. 04-70, *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21548 ¶ 47 (2004) ("*Cingular-AT&T Wireless Order*").

<sup>42</sup> *See, e.g., Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21548-49 ¶ 49 ("The Commission's long-held position [is] that there 'must be an ultimate adjudication before an appropriate trier of fact, either by a government agency or court, before we will consider the activity in our character determinations.'"); Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, Federal Communications Commission, to Timothy K. Brady, Esq., Womble Carlyle Sandridge & Rice, P.L.L.C, 20 FCC Rcd 11987, 11993 (2005).

<sup>43</sup> Policy Regarding Character Qualifications in Broadcast Licensing, *Report and Order and Policy Statement*, 102 FCC 2d 1179, 1205 n.60 (1986) ("Character Policy Statement"), *recon. granted in part, denied in part*, 1 FCC Rcd 421 (1986), *modified*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991), *modified in part*, 7 FCC Rcd 6564 (1992). The Commission reserved judgment as to what type of misconduct would meet this standard, noting that such determinations would be made "with regard to a specific application involving specific misconduct." Character Policy Statement, 102 FCC 2d at 1205 n.60. *See also* Williamsburg County Broadcasting Corp., MM Docket No. 88-536, *Order to Show Cause*, 5 FCC Rcd 3034, 3035 ¶ 13 (1996) ("*Williamsburg County Broadcasting*").

<sup>44</sup> *See, e.g.,* O.D.T. International, *Memorandum Opinion and Order*, 9 FCC Rcd 2575, 2576 ¶ 9 (1994).

<sup>45</sup> *See, e.g., AT&T-BellSouth Order*, 22 FCC Rcd at 5756 ¶ 191; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21548 ¶ 47.

<sup>46</sup> *See* NatTel Reply at 4.

<sup>47</sup> PRTC Opposition at 6, citing Character Policy Statement, 102 FCC 2d at 1205 n.60 (1986).

not assess character qualifications in advance of a pending adjudication that would resolve non-Commission-related issues—especially where the remedy solely would be monetary damages. In this context, we disagree with NatTel’s argument that PRTC or Móvil has engaged in such egregious misconduct as to rise above that limitation. We find that the misconduct alleged by NatTel is not of the nature that would prompt our immediate concern prior to the resolution of the pending judicial proceedings.<sup>48</sup>

14. We also find that PRTC has met the requirement to disclose any real party in interest. NatTel appears to concede that PRTC, in its Form 601, references a disclosure in Form 602 that Móvil indirectly owns 100 percent of PRTC.<sup>49</sup> However, NatTel argues that an indirect 100-percent owner is not necessarily the applicant’s real party in interest, and that here, there is a lack of disclosure as to “who or what owns and controls Móvil, and how that control is exercised.”<sup>50</sup> While acknowledging that PRTC did disclose the identity of the Slim family who holds equity and voting interest in Móvil, NatTel argues that further detail is necessary to meet the real-party-in-interest disclosure requirement, including who within that family exercises what kind of control, and how much.<sup>51</sup> Further, NatTel introduces additional allegations of control with respect to the Slim family ownership of Móvil, including a trust that holds shares for the family’s benefit and a real estate holding company.<sup>52</sup>

15. We find that PRTC has satisfied the ownership disclosure requirements under section 1.2112 of the Commission’s rules.<sup>53</sup> Generally, section 1.2112 requires the disclosure of the real party or parties in interest and any party holding a 10 percent or greater direct or indirect interest in an applicant.<sup>54</sup> PRTC reports in its Form 602 filed on September 16, 2008 that “although no individual member of the Slim family directly or indirectly owns a 10 [percent] or greater equity interest in . . . Móvil, the controlling interest in . . . Móvil’s shares is held by the Slim family. . . .”<sup>55</sup> PRTC further states that “[t]here are no other beneficial owners of a 10 [percent] or greater equity interest in . . . Móvil.”<sup>56</sup> Although PRTC does not designate a real party in interest in its application, we are satisfied by PRTC’s disclosure in its Form 602 that Carlos Slim Helú and his family collectively hold the majority of the voting interests in Móvil and that Carlos Slim Helú has control of Móvil, as stated in the Application. The instructions to the Form 601 state that “[i]f a party other than the Applicant is the real party in interest (e.g., a parent or other controlling entity), enter that party’s name in [response to Question 28]. If there is

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<sup>48</sup> Compare Application of Multimedia, Inc. (Transferor), and Gannett Co., Inc. (Transferee), *Memorandum Opinion and Order*, 11 FCC Rcd 4883, 4896 ¶ 37 (1995) (unadjudicated antitrust and labor allegations are not “egregious misconduct”), Application of Press Broadcasting Company, Inc., Assignor, and Paxson Broadcasting of Orlando, L.P., Assignee, *Memorandum Opinion and Order*, 13 FCC Rcd 1026, 1029 ¶ 11 (1997) (unadjudicated allegations of tax fraud are not “egregious misconduct”), and USA Broadcasting, Inc. (Transferor) and Univision Communications, Inc. (Transferee), 19 FCC Rcd 4253, 4256 ¶ 9 (2005) (unadjudicated allegations involving contract interpretation is not “egregious misconduct”), with Contemporary Media, Inc., MM Docket No. 95-154, *Order to Show Cause and Notice of Apparent Liability*, 10 FCC Rcd 13685, 13687 ¶ 9 (1995) (allegations of child sexual abuse and assault may constitute egregious misconduct) and *Williamsburg County Broadcasting*, 5 FCC Rcd at 3035 ¶¶ 13-14 (allegations of drug trafficking may constitute egregious misconduct).

<sup>49</sup> See NatTel Reply at 2.

<sup>50</sup> See *id.*

<sup>51</sup> See *id.* at 2-3.

<sup>52</sup> See *id.* at 3 n.11.

<sup>53</sup> 47 C.F.R. § 1.2112.

<sup>54</sup> *Id.* § 1.2112 (a)(1), (2), (6).

<sup>55</sup> September 9, 2008 Form 602, Exhibit, Revised Description of Direct and Indirect Ownership of PRTC at 2.

<sup>56</sup> *Id.*; January 2, 2008 Form 602, Indirect Ownership Attachment at 2.

more than one real party in interest, attach an exhibit detailing all parties in interest.”<sup>57</sup> Although there is no exhibit clearly identifying the real party or parties in interest, the information contained in the attachments to the Application and Form 602 explain that Carlos Slim Helú has control of Móvil, which, in turn, is in control of PRTC. Since this information is disclosed, we do not find that there has been a misrepresentation to the Commission that impacts PRTC’s eligibility to be a Commission licensee. Further, we only have mere allegations by NatTel, and no factual support, that the trust and real estate holding company that NatTel discusses are in control and a real party in interest of Móvil. In fact, there is no evidence in the record to suggest that these entities are even required to be disclosed under any of the provisions in section 1.2112 of the Commission’s rules. Accordingly, for the reasons discussed herein, we deny NatTel’s Petition.

#### IV. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, that the petition to deny filed by NatTel, LLC on April 29, 2008, IS DENIED, and application File No. 0003382234, filed on April 2, 2008, SHALL BE PROCESSED consistent with this Order and the Commission's Rules.

17. This action is taken under delegated authority pursuant to sections 0.131 and 0.331 of the Commission’s Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Roger S. Noel  
Chief, Mobility Division  
Wireless Telecommunications Bureau

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<sup>57</sup> Federal Communications Commission, Form 601, Information and Instructions (Feb. 2008), *available at* <http://www.fcc.gov/Forms/Form601/601main.pdf> (last visited Aug. 20, 2008).